

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Jefferson P. VanderWolk, Executor of the
Estate of Walter W. VanderWolk, Jr.

Plaintiff,

V.

Christopher Swenson,

Defendant.

Civil Action No. 1:08-cv-00450-SM

DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant Christopher Swenson, by his attorneys, Preti, Flaherty, Beliveau & Pachios, PLLP, respectfully submits the within Objection to Plaintiff's Motion for Summary Judgment, and in support thereof, represents as follows:

1. The Plaintiff has moved for summary judgment on its claim and all of Defendant's Counterclaims. The Motion should be denied as the Plaintiff has not shown that the material facts are not in dispute and has not shown an entitlement to judgment as a matter of law.

2. The tax obligation asserted by the Plaintiff arises because Walter VanderWolk elected to treat as non-taxable the bequest of a certain parcel of real estate, the so-called Bald Peak property, when serving as the Executor of the Estate of Sabra VanderWolk, his late wife and Defendant's late mother. One effect of this election was to increase the residue of Sabra's Estate passing to Walter's children. Walter VanderWolk disregarded Sabra's intent, he substituted his own plan, he acted in his interests and the interests of his children, to the detriment of Chris Swenson, and he otherwise breached his fiduciary duties. Another effect was to defer the tax to the time of Walter's death, at which time it was owed by Defendant.

3. Sabra VanderWolk owned the Bald Peak property, and in her will she gave Walter a life estate with the remainder to Christopher at Walter's death. Walter's election was to defer the tax on the Bald Peak property until his death. Rather than pay the tax on the Bald Peak property out of the proceeds of Sabra's Estate, which would have diminished the Trust set up for the benefit of Walter and his children, Walter took action to require Chris to pay the tax.

4. It was Sabra's intent that Chris not pay any tax on the devise of the Bald Peak property and that any taxes be paid out of the residue of her Estate. On at least two occasions, Walter told Chris there would be no tax liability on him, which was completely untrue. Walter fraudulently, or at least negligently, misrepresented the facts to Christopher and failed to correct his misstatement. Walter's actions constitute a breach of his fiduciary duties to Chris as a beneficiary. Walter's Estate was unjustly enriched by Walter's actions, as Walter utilized funds directly received from Christopher's grandmother that were earmarked to pay the Bald Peak taxes, and used those funds to fund a trust for the benefit of Walter and his children from a prior marriage. In the end the Estate should be estopped from seeking to recover the tax from Chris because of Walter's breaches.

5. The material facts are disputed and Plaintiff has failed to show he is entitled to judgment as a matter of law.

6. A Memorandum of Law in support of Defendant's Objection is attached hereto.

WHEREFORE, for the reasons set forth above, Christopher Swenson respectfully requests this Honorable Court:

- A. Hold a hearing on Plaintiff's Motion for Summary Judgment;
- B. Deny Plaintiff's Motion for Summary Judgment; and
- C. Grant such other relief as may be just and proper.

Respectfully submitted,

CHRISTOPHER SWENSON

By his attorneys,

PRETI, FLAHERTY, BELIVEAU &
PACHIOS, PLLP

Dated: October 19, 2009

By: /s/ Peter G. Callaghan
Peter G. Callaghan, NH Bar # 6811
P.O. Box 1318
Concord, NH 03302-1318
(603) 410-1500
pcallaghan@preti.com

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October 2009 I forwarded a copy of the foregoing *Objection to Plaintiff's Motion for Summary Judgment* to all counsel of record electronically via ECF.

/s/ Peter G. Callaghan
Peter G. Callaghan